Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL A. MARCAVAGE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for Writ of Certiorari to the Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

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July 1, 2010

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Massachusetts Appeals Court, in affirming petitioner's conviction for disorderly conduct based solely on alleged conduct outside the scope of both the bill of particulars and the prosecution's case at trial, sanction a denial of petitioner's due process of law in conflict with relevant decisions of this Court and U.S. courts of appeals?

2. Did the Massachusetts Appeals Court, in affirming petitioner's arrest and conviction, sanction the Salem police's targeted confiscation of petitioner's megaphone and the restriction of his First Amendment speech in conflict with relevant decisions of this Court and other state courts?

3. Did the Massachusetts Appeals Court, in affirming petitioner's arrest and conviction, sanction the Salem police's targeted confiscation of petitioner's megaphone and the restriction of his free exercise of religion in conflict with relevant decisions of this Court?

4. Did the Massachusetts Appeals Court, in affirming petitioner's arrest and conviction, sanction the Salem police's targeted confiscation of petitioner's megaphone and the restriction of his right to equal protection of the laws in conflict with relevant decisions of this Court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14.1(b) and 29.6, the Foundation for Moral Law, whose counsel is representing petitioner in the present case, hereby discloses that it is an incorporated non-profit legal organization that has no parent corporations and of which no publicly-held company owns 10% or more of its stock.

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ORDERS AND OPINIONS BELOW

On March 10, 2008, petitioner Michael A. Marcavage was convicted of disorderly conduct and fined by Salem District Court of the Commonwealth of Massachusetts, Hon. Michael A. Uhlarik, Case No. 0736CR003506. (App. 25a.) On December 23, 2009, the Massachusetts Court of Appeals affirmed. *Commonwealth v. Marcavage*, 918 N.E.2d 855 (Mass. App. Ct. 2009) (App. 3a.), *reh'g denied*, Feb. 4, 2010 (App. 2a). On March 31, 2010, the Massachusetts Supreme Judicial Court denied further appellate review. *Commonwealth v. Marcavage*, 925 N.E.2d 547 (Mass. 2010) (Table) (App. 1a).

JURISDICTION

On March 31, 2010, the Massachusetts Supreme Judicial Court denied further appellate review of the Massachusetts Court of Appeals opinion issued on December 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1287(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Free Speech and Free Exercise of Religion clauses of the First Amendment (App. 28a), and the Due Process and Equal Protection clauses of the Fourteenth Amendment (App. 28a), to the United States Constitution.

STATUTES INVOLVED

This case involves Mass. Gen. Laws Ch. 272, § 53 (App. 30a) and Ch. 277, § 35 ((App. 31a), and Salem Code of Ordinances Art. I, § 22 (App. 32a).

STATEMENT OF THE CASE

1. Statement of the Facts

On October 31, 2007, petitioner Michael Marcavage and his Christian evangelism group Repent America visited Salem, Massachusetts to publicly preach about their religious beliefs. Throughout that Halloween evening, petitioner and his associates preached from the edge of a dried out fountain on a public sidewalk, sometimes with the assistance of a megaphone, held signs containing scriptures, and offered religious literature to passersby. At no time that evening did petitioner or his associates ever give or receive physical aggression, or the imminent threat thereof, to or from the crowd.

Despite the fact that the Salem noise ordinance permitted the use of amplification until 10:00 p.m. (App. 32a), the Salem Police Department instructed its police officers to silence megaphones at 8 p.m. that evening. Around 8:00 p.m., despite the fact that nearby businesses, street shows, and street vendors were still using sound amplification, Salem police ordered one of petitioner's associates to cease use of his megaphone. After unsuccessfully attempting to discuss the situation with a supervising police officer, and believing that he and his group were being singled out because of their religious speech, petitioner turned the megaphone on around 8:30 p.m. and began preaching from the edge of the fountain.

Petitioner was soon approached by a Salem officer who ordered him to turn the megaphone off. When petitioner did not comply, the officer rounded up several other officers. Lt. Lemelin then grabbed the

megaphone, which was strapped over petitioner's shoulder, and attempted to pull it away. Petitioner did not immediately relinquish the megaphone and asked the officer why he was forcing him to shut his amplification down when other amplification was being used by numerous people and businesses nearby. Other officers soon piled up against petitioner, who toppled into the dried-out fountain and let go of the megaphone. He was picked up, arrested, and never resisted, all the while trying to calmly argue his case.

Others nearby on the crowded sidewalk vocalized both approval or disapproval of the police action taken against petitioner. The entire megaphone confiscation and arrest, as well as much of petitioner's preceding evangelism activities, were captured on a video recording that was entered into the record at trial. (Tr. Exhibits 2-A, 2-B, and 2-C.)

2. Pretrial

Petitioner was charged with disorderly conduct under Mass. Gen. Laws Ch. 272 § 53 (App. 30a), and with a violation of Salem's noise control ordinance, Salem Code Art. I, § 22 (App. 32a). The Commonwealth agreed to dismiss the noise ordinance charge in January 2008 and the charge was duly dismissed at trial.

The Commonwealth proceeded with its prosecution of the disorderly conduct charge, but not for the conduct surrounding the confiscation of the megaphone. Instead, in its Bill of Particulars, the Commonwealth alleged that petitioner

(1) "is a disorderly person due to his conduct on October 31, 2007, between 4:00 PM and 8:35 P.M.," and

(2) "involved himself in tumultuous behavior by forcing literature in the faces of attendees, yelling, screaming, taunting, and recklessly waving a crucifix in and about the faces of attendees as they past [sic] by the public pulpit set up by the group Repent America." (App. 26a.)

The remaining allegations were that "this activity affected the public, those attending the Halloween Happenings," and "that this behavior caused public inconvenience, annoyance and alarm." (App. 26a-27a.)

3. Trial

At the beginning of the March 10, 2008 bench trial, the Commonwealth made sure "the record reflects" that it

> "was moving on the first prong of disorderly, which is alleging—citing threatening or tumultuous behavior as opposed to the second prongs [sic], which is creating a hazardous or physically offensive condition by an act that served no legitimate purpose. We are proceeding on the first prong." (Trial Transcript 8-9.)

Moments later, the Commonwealth reiterated:

> "I just want to make the point, Your Honor, that it was—we're alleging tumultuous and threatening behavior as opposed to a freedom of speech issue." (Tr. 10-11.)

The Commonwealth's case, from beginning to end, rested upon allegations of petitioner's evangelism methods, not the megaphone confiscation.

Petitioner made a motion for directed verdict, reminding the court that "all the evidence we have heard here today is regarding [petitioner's] use of the megaphone." (Tr. 107.) Petitioner also argued here that his preaching "which is protected by the Massachusetts and the United States Constitution, it's protected expression of religious speech." (Tr. 108.) After the Commonwealth's response in opposition to the motion, the court asked defense counsel, for the first time, about petitioner's "resisting the officer from confiscating the megaphone." (Tr. 113; App. 18a.) After petitioner's counsel responded that he was trying to get an explanation since other amplification in the vicinity was allowed to continue, the court denied the motion. (Tr.. 115-16; App. 19a-20a.)

In final arguments, petitioner reminded the court that the "Bill of Particulars is very specific" in focusing on only the evangelism allegations, and even read the court a pertinent portion of the bill. (Tr. 194-195.) Petitioner also argued that he was "exercising his First Amendment and Massachusetts constitutional rights to preach the gospel on a public sidewalk" and that "any discriminatory behavior by the police [was] . . . because of the nature of his speech." (Tr. 202.) Petitioner told the court this "is a specific targeting against him for exercising his rights to free speech, to freedom of expression, freedom of religion. It was also a concern of equal protection here, equal protection of the laws under the 14th Amendment. Why was he alone enforced

against . . . [with] this arbitrary 8:00 deadline[?]" (Tr. 203.)

For its part, the Commonwealth again stuck with the scope of the bill of particulars and focused on the testimony of the four officers who saw that other people "felt scared of [Repent America]," (Tr. 206.), that they were "going up to people with pamphlets" and "stepp[ing] in front of their way," (Tr. 208) and that it was a "loud situation" that could have spun "out of control" (Tr. 209). The prosecutor also mentioned that "they defied the order" about the megaphone and "continued to use" it," but conspicuously still did *not* expand its theory to mention the incident involving the megaphone confiscation. (*Id.*)

The Salem court found petitioner guilty of disorderly conduct based *not* on petitioner's evangelism activities throughout the night in question, but solely on the megaphone confiscation. (Tr. 216-221; App. 21a-25a.) The court never addressed the scope of the bill of particulars and categorically rejected the constitutional arguments raised, holding that this case was "not an issue of depriving anyone of freedom of speech," but a "question of public safety" (Tr. 220-21; App. 25a), noting that petitioner's continued use of the megaphone in such a large and drunken Halloween crowd "could create a tumultuous situation." (Tr. 219-221; App. 23a-24a.) Petitioner was convicted of disorderly conduct and fined $200 plus a $90 victim fee. The fine was stayed pending appeal.

4. Appeal

Petitioner appealed to the Massachusetts Appeals Court, raising in his brief and in oral arguments, in pertinent part, that (1) the difference between the prosecution's case and the trial court's finding worked a prejudicial variance that denied petitioner of due process of law owed to him by Mass. Gen. Laws. Ch. 277 § 35 (App. 31a) (Def. Br. p. 25 et al.); and (2) that the police confiscation of petitioner's megaphone, in the midst of other nearby amplification, violated his rights to federal and state freedom of speech, freedom of religion, and equal protection of the laws. (Def. Br. pp. 31 et al.).

On December 23, 2009, the Massachusetts Court of Appeals affirmed the disorderly conduct conviction. *Commonwealth v. Marcavage*, 918 N.E.2d 855 (Mass. App. Ct. 2009) (App. 3a.), *reh'g denied*, Feb. 4, 2010 (App. 2a). The appeals court recognized that the trial court "apparently premised the defendant's conviction solely on his defiance of the order to stop using the megaphone and the direct consequences of his refusal to do so," rather than on petitioner's "missionary appeals and preaching." *Id.* at 858 & n.5 (App. 7a). The court, accordingly, limited its inquiry to the conduct concerning the megaphone confiscation only. *Id.* at 858 (App. 7a). Nevertheless, the court held in a footnote that petitioner was given sufficient notice in the bill of particulars because, "while the megaphone is not mentioned specifically, the focus in the bill of particulars nonetheless was on the high noise level associated with the defendant's activities and the effects of same," and, further, the bill incorporated by reference police reports that

included the megaphone confiscation allegations. *Id.* at 858 n.6 (App. 7a-8a).

As to the constitutional arguments raised on appeal by petitioner, the appeals court said it found "nothing in the record to support the inference that the decision to curtail the defendant's use of the megaphone was in any way connected with the content of his speech," noting that "similar limits were imposed on at least one other nearby group." *Id.* at 860 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (App. 11a). The court also noted "that the police order by no means prevented the defendant from disseminating his message," but was directed only at the manner of delivery; and that the restriction was a "response to the changing conditions during the evening." *Id.* (App. 11a.) The court concluded that the police action was an "appropriate response to a bona fide public safety threat." *Id.* (App. 11a.)

After the appeals court denied rehearing (App. 2a), petitioner filed a petition for further appellate review with the Massachusetts Supreme Judicial Court, raising all these issues again, but the court declined review. *Commonwealth v. Marcavage*, 925 N.E.2d 547 (Mass. 2010) (Table) (App. 1a). Petitioner now files this certiorari petition.

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT DECISION, BY AFFIRMING PETITIONER'S CONVICTION BASED UPON CONDUCT NOT ALLEGED IN THE BILL OF PARTICULARS NOR PROSECUTED BY THE COMMONWEALTH, SANCTIONED A DENIAL OF ADEQUATE DUE PROCESS NOTICE, CONTRARY TO THE DECISIONS OF THIS COURT AND U.S. COURTS OF APPEALS.

Massachusetts General Laws Ch. 277, § 35 describes the procedural process that was due petitioner in the courts below: a defendant may be acquitted "on the ground of variance between the allegations and proof if . . . he is thereby prejudiced in his defence [sic]." (App. 31a.) The bill of particulars given to petitioner—and never amended—only specified behavior occurring *before* the megaphone confiscation: "forcing literature in the faces of attendees, yelling, screaming, taunting, and recklessly waving a crucifix in and about the faces of attendees as they past by the public pulpit set up by the group Repent America." (App. 26a-27a.) The Commonwealth did not interpret its bill of particulars to include the megaphone confiscation, and communicated as much to defense counsel by telephone before trial. Petitioner's defense at trial was, not surprisingly, aimed primarily against the allegations surrounding his evangelism tactics on the night in question.

At trial, the Commonwealth argued in opposition to petitioner's motion for a verdict of not guilty and in closing arguments that his evangelism activity was tumultuous—not his conduct during the megaphone

confiscation. Indeed, petitioner was not convicted of any of his earlier evangelism behavior, as the Appeals Court conceded. *Marcavage*, 918 N.E.2d at 858 (App. 7a). Petitioner was therefore prejudiced by the trial court's bait-and-switch, as it were, and would have conducted his defense differently, including making appropriate objections and personally taking the stand, had he known the case against him exceeded the plain limits of the bill of particulars.

While conceding that the bill of particulars never mentioned the megaphone, the Appeals Court asserted below that the "focus in the bill of particulars nonetheless was on the high noise level associated with the defendant's activities and the effects of same," and that the bill incorporated by reference police reports that included the megaphone confiscation allegations. *Id.* at 858 n.6 (App. 7a-8a). This may be a convenient and creative after-the-fact reading, but it is not supported by the text or context of the bill of particulars. Moreover, the inclusion of a reference to the police reports still failed to give petitioner notice of the grounds upon which he was charged; in fact, the prosecutor expressly told the defense that the megaphone confiscation would *not* be made an issue at trial. The Appeals Court's unfounded reading of the bill of particulars has only added to the "unfair surprise" that hampered the defense at trial.

Thus, the Appeals Court relied upon a novel reading of the bill of particulars never advanced by the Commonwealth and expressly disclaimed by it prior to trial, never prosecuted at trial, and never even advanced by the Commonwealth on appeal, to

support a conviction for conduct not mentioned therein. After the Appeals Court's decision, petitioner has now been forced to contend with three different interpretations of the same bill of particulars.

The Appeals Court's decision conflicts with the due process clause of the Fourteenth Amendment—"nor shall any State deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1—and with decisions in this Court, such as *Dunn v. United States*, 442 U.S. 100 (1979), *Russell v. United States*, 369 U.S. 749 (1962), and *Cole v. Arkansas*, 333 U.S. 196 (1948); and it conflicts with decisions of U.S. Courts of Appeals in *Cola v. Reardon*, 787 F.2d 681 (1st Cir. 1986), and *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005).

In *Dunn*, the defendant was convicted of making false statements to a grand jury, but the prosecution's case that supported the conviction was premised on one statement by Dunn, while the appeals court upheld the conviction based on a different, later statement. 442 U.S. at 104-105. This Court determined that Dunn's earlier statement did not fall within the definition of the statute as an "ancillary statement" related to the grand jury proceedings and that the appeals court could not simply choose a different factual premise to support the conviction. *Id.* at 106. This Court explained:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See *Eaton v. Tulsa*, 415 U.S. 697, 698-

> 699, 94 S.Ct. 1228, 1229-1230, 39 L.Ed.2d 693 (1974) (*per curiam*); *Garner v. Louisiana,* 368 U.S. 157, 163-164, 82 S.Ct. 248, 251-252, 7 L.Ed.2d 207 (1961); *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948); *De Jonge v. Oregon,* 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937).

Dunn, 442 U.S. at 106-107.

In the instant case, similar to *Dunn*, the trier-of-fact was presented with one portion of the defendant's alleged conduct but chose to convict petitioner on another. The appeals court likewise affirmed based on the never-prosecuted portion of the facts.

The decision below also conflicts with *Russell v. United States,* 369 U.S. 749 (1962). In *Russell*, the petitioners were convicted for refusing to answer questions when summoned before a congressional subcommittee, but were indicted by a grand jury that never specified the subject under investigation by the subcommittee. *Id.* at 752-53. The Court held that the indictments were deficient in failing to fully identify the nature of the charges against the petitioners:

> The vice which inheres in the failure of an indictment under 2 U.S.C. s 192, 2 U.S.C.A. s 192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, * * *.' *United States v. Simmons*, [96 U.S. 360, 362 (1877)].

Russell, 369 U.S. at 766.

In the instant case, petitioner was apprized and defended against a specific bill of particulars and a specific case-in-chief brought by the Commonwealth. The bill of particulars was not merely vague, as was the indictment in *Russell*; rather, it did not include separate and distinct alleged conduct that the Commonwealth had already indicated it would not prosecute. For the trial court to base its conviction on conduct never prosecuted entirely deprived petitioner of the opportunity to adequately receive notice of the nature of the accusation against him. As this Court noted in *Russell*:

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.

369 U.S. at 766.

Fair notice is an essential part of criminal prosecutions:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196 (1948); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] conviction upon a charge not made ... constitutes a denial of due process.") Petitioner was denied due process at trial and—by affirming based upon the

unprosecuted facts of the megaphone confiscation—by the Appeals Court.

In fact, the first time the Commonwealth ever argued that petitioner's megaphone confiscation was the basis of the charges against him was when it found itself having to defend the trial court's decision on appeal. Even then, the Commonwealth conceded that it never based its prosecution on the confiscation, instead claiming that the trial court had, *sua sponte*, "effectively amend[ed] the bill of particulars" by questioning defense counsel in mid-trial about that event. (See Com. Br. at 33-36.) This is hardly the adequate and specific notice required under this Court's due process jurisprudence.

The U.S. Court of Appeals for the Sixth Circuit applied these cases in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), when the court reversed most of the counts of a 40-count conviction for abuse because the defendant "was prosecuted and convicted for a generic pattern of abuse rather than for forty separate abusive incidents." *Id.* at 634. "The indictment, the bill of particulars, and even the evidence at trial failed to apprise the defendant of what occurrences formed the bases of the criminal charges he faced." *Id.* The court rejected the state's "carbon-copy" charges of abuse without individual specificity and held that the defendant was denied adequate notice of the alleged conduct that supported his conviction. *Id.*

In another case that originated out of Massachusetts, *Cola v. Reardon*, 787 F.2d 681 (1st Cir. 1986), the U.S. Court of Appeals for the First Circuit granted a habeas corpus petition to a defendant whose conviction under a conflict-of-

interest statute was "unconstitutionally affirmed on a theory of guilt not set forth at trial." Relying, in part, upon *Dunn*, *supra*, the court held:

> [W]e believe that, in order for any appellate theory to withstand scrutiny under *Dunn*, it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon reviewing the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense.

Id. at 693. Evidence was offered at trial that supported the conviction challenged by the petitioner in *Cola*, but the court could not "find any basis for concluding that the prosecution 'built its case' on such evidence." *Id.* The court concluded:

> Accordingly, because we regard due process as requiring the appellate theory to be set forth in both the indictment and the proof at trial, and because we find the references at trial to the appellate theory to be at best incidental, we reject the Commonwealth's contention that due process can be reinstated through references (here implicit) to the appellate theory in the indictment.

Id. at 697.

In the instant case, the Commonwealth, as it had done in *Cola*, relied upon a few trial instances that referred to evidence of the megaphone confiscation (the trial court's and appellate court's theory of the case), even though the prosecution was premised upon the petitioner's evangelism activities, from beginning to end. As the cases above demonstrate, the Commonwealth should not be permitted to deny

petitioner adequate notice of the factual basis for the case presented to the trier-of-fact and then reconstruct a different case on appeal.

II. THE APPEALS COURT DECISION AFFIRMED AN INFRINGEMENT OF PETITIONER'S FREEDOM OF SPEECH, FREEDOM OF RELIGION, AND EQUAL PROTECTION RIGHTS, CONTRARY TO DECISIONS OF THIS COURT AND OTHER COURTS.

Petitioner raised three federal constitutional issues in each of the Massachusetts courts: that the targeting of his religious speech for megaphone confiscation was a violation of his First Amendment rights to free speech and free exercise of religion and a violation of his right to equal protection of the laws under the 14th Amendment. The Appeals Court only expressly addressed the free speech argument.

A. Petitioner Was Targeted Because of the Content of His Speech.

Petitioner had the right under the Salem noise ordinance to use a megaphone until 10:00 p.m. Salem Code Art. I, § 22-2 (App. 32a). Video evidence in the record and trial testimony showed that before, during, and after petitioner's arrest, nearby street shows, vendors, and bars blared amplified music and sound in the streets with impunity. (Tr. Ex. 2-B.) Indeed, this was exactly what petitioner pointed out to the officers when he asked why they were silencing his megaphone instead of other amplification equipment in the vicinity. (Tr. Ex. 2-C.)

The officers themselves testified to the religious content and viewpoint of Defendant's speech; his beliefs about the Bible, sin, repentance, and Halloween; and the offense that some people in the crowd took to his speech. (Tr. 46-47, 64, 93, 102, 105-106.) It was the content and viewpoint of his speech that brought petitioner to Salem, that set him apart from the crowd in Salem, and that drew the attention of police. The fact that the police testified that they shut down megaphone use by another group espousing anti-abortion does not demonstrate an evenhanded application of the 8:00 cut-off, as the Appeals Court suggested, but an intent by police to target speech that was unwanted in Salem or opposed to the party atmosphere on Halloween night.

The Appeals Court decision in this case conflicted with this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Ward* this Court held:

> [I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. . . . Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech."

491 U.S. at 791. To so hamper and dampen the petitioner's evangelistic, religious speech, while leaving other, less uncomfortable, more "Halloween-

friendly" speech free to be amplified, was not content neutral.

Additionally, silencing petitioner's megaphone did not leave adequate alternative channels of communication open to petitioner because it put his bare voice at a distinct disadvantage against that loud, congested crowd. The Appeals Court's affirmance therefore conflicts with *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In *Gilleo*, this Court held that a city law banning most residential signs was an impermissible manner restriction, partly because while Gilleo was still free to espouse her beliefs through newspaper ads and leafleting, she was trying to reach her *neighbors*, an "audience [that] could not be reached nearly as well by other means." *Id.* at 57.

In this case, forcing petitioner to change the manner of expression from amplified to natural voice was tantamount to regulate the content of expression itself because he could not effectively reach his boisterous audience. Marcavage's speech was targeted for its content and unconstitutionally hampered in its manner. The Appeals Court's justification of the police action here sets a dangerous precedent for the exercise of free speech in the Commonwealth.

B. The Massachusetts Courts Applied a Unique "Potential" Heckler's Veto to Infringe Petitioner's Right to Free Speech.

Petitioner's speech may have run contrary to what most people were in Salem to hear, but this is precisely what is protected by the right to free speech in the First Amendment: "Congress shall make no

law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I. To the extent Marcavage's speech may have been unwelcomed in Salem, he should not have been censored by a "heckler's veto."

The trial court attempted to justify petitioner's censorship by noting that on Halloween in Salem "from 60,000 to 80,000 people cram into a very tight space," that at 8:00 p.m. "the crowd begins to change," causing "a concern for a drunkenness, violent behavior and so forth," and that petitioner's use of the megaphone and preaching "tactics . . . *could* create a very tumultuous situation." (Tr. p. 217. App. 22a-24a.) (Emphasis added.) Likewise, the Appeals Court, while agreeing that

> his underlying conduct, particularly dissemination of his religious message, may have enjoyed First Amendment protection, that protection did not entitle him to disregard police commands reasonably calculated at ensuring public safety amid *potentially* dangerous circumstances.

Marcavage, 918 N.E.2d at 860 (App. 12a) (emphasis added). The courts below, therefore, never even established an *actual* public safety issue with petitioner's megaphone preaching; only speculating that his amplified speech *could have* led to problems later in the evening.

This Court long ago rejected suppression of speech with a "heckler's veto." The courts below contradict the holding of *Terminiello v. City of Chicago*, 337 U.S. 1 (1949):

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and

> have profound unsettling effects as it presses for acceptance of an idea. . . . [F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. at 4. Accordingly, the Court in *Terminiello* held unconstitutional a conviction of disorderly conduct under a statute that "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.* at 5. At most, the Commonwealth showed that petitioner's speech aroused dispute, annoyance, and maybe even anger, but never any violence or even the actual threat thereof.

Additionally, as this Court held in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), any public unrest that does arise from speech should prompt police to quash the tumult of the *crowd* instead of the *speech* itself. How much more so are the police to show restraint when the "veto" is exercised by a "potential" or imagined heckler?

Courts in other states have decided similar cases in favor of free speech instead of suppression. In *City of Eugene v. Lee*, 34 P.3d 690 (Or. 2001), the Oregon Court of Appeals reversed a street preacher's conviction for disorderly conduct when he was arrested not for "any physical act of aggression" but simply because the officer "believed that others who heard defendant's words were going to engage in physical acts of aggression." *Id.* at 694. The court in that case held that the defendant's speech, although

provocative, did not meet the definition of "fighting" or of "violent, tumultuous or threatening behavior." *See also Commonwealth of Penn. v. Gowan*, 582 A.2d 879, 882 (Pa. Super. 1990) (reversing conviction for disorderly conduct by making "unreasonable noise" where defendants' loud, religious preaching in public park during busy noon hour did no more than annoy some passersby: "When engaged in a constitutionally protected activity of the fundamental nature of freedom of speech, we must exercise restraint in prohibiting the activity lest we destroy the right. . . . Thus, in the context of this case, when a protected first amendment right to free speech is implicated, it is necessary that the actor *intend* to breach the public peace by making unreasonable noise.") By contrast, the Massachusetts Appeals Court in this case approved of hampering protected speech because of the mere *potential* of an unrealized public safety concern.

C. The Appeals Court Did Not Address Petitioner's Argument that Salem Police Infringed Upon His Right of Free Exercise of Religion.

The Appeals Court ignored petitioner's separate argument that the Salem police infringed on his free exercise of religion. Petitioner argued on appeal that the Commonwealth infringed on his rights under this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205, 215-229 (1972), because, even after *Employment Division v. Smith*, 494 U.S. 872 (1990), the Massachusetts Supreme Court continues to follow the compelling interest and less restrictive means test of *Yoder*. *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994). Under the relevant test,

first, petitioner undoubtedly holds a sincere religious belief, uncontroverted by the Commonwealth, and came to Salem on Halloween for the purpose of espousing that belief. *E.g., Marcavage*, 918 N.E.2d at 856-57 (finding that "defendant is the director of a proselytizing group that visits Salem each Halloween to preach to the crowds") (App. 3a-4a). Second, his arrest, trial, and conviction substantially burdened the exercise of that sincere religious belief in Salem by first limiting his ability to communicate his message and then shutting him down completely. Third, petitioner having satisfied the first two prongs of the test, the burden shifts to the Commonwealth to prove that it had a compelling interest that could not have been achieved by less restrictive means.

Even under the *Smith* rationale, the compelling interest/less restrictive means test applies to state action that is directly aimed at religion, and this Court has applied the compelling interest/less restrictive means test even to state action that is neutral on its face if that action in its motivation or application is aimed directly at religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In this case, the police policy that amplification be shut off at 8:00 p.m. was not, on its face, directly aimed at petitioner or Repent America, but in practice the evangelists were singled out for arrest and prosecution. Other people and groups besides petitioner and Repent America were using amplification past 8:00 p.m., as unrebutted video evidence (Ex. 2-C at 8:18-8:30 p.m.) and testimony by both Lt. Lemelin and Officer Puleo confirmed. (Tr. p. 52-54, 69.) Indeed, petitioner's expressed purpose for holding onto the megaphone when the police tried to snatch it from him was to

point out nearby uses of amplification that the police were not shutting down. (Ex. 2-C at 8:28-8:29 p.m.) Even if the police department could unilaterally change the cutoff time for megaphone use, such a code variance would then have to be applied equally to include those engaged in religious speech as well as amplification in street shows, outdoor bar music, and vendors. Instead, the police officers enforced its megaphone policy against one "anti-abortion" group (Tr. p. 45) and Repent America evangelists. Such a skewed and selective enforcement of a unilateral and arbitrary police policy unequally burdened petitioner's religious expression.

The trial court was unavailing in its attempt to justify the officers' decision to target petitioner and Repent America by stressing the fact that "Halloween in Salem is a unique day of the year" (Tr. p. 217; App. 22a) and that "at 8:00 . . . the content of the crowd begins to change . . . to one of, again, a concern for a drunkenness, violent behavior and so forth" (Tr. p. 219; App 23a). Given the fact that other amplification was allowed to proceed, the concern by police was not the noise level caused by amplification in general, but it was *petitioner's* amplified *evangelism and religious speech* that made it a "question of public safety." (Tr. p. 221; App. 25a.) His amplified religious expression, particularly that which speaks against Halloween, may indeed be less popular in Salem on Halloween night than the music of a street show or a bar, but under the relevant noise ordinance, he had just as much of a right to add his voice to the cacophony and spread the gospel without being singled out for police interference because of his religious expression.

The Commonwealth failed to establish that it had a compelling interest that required the police to effectively silence petitioner. The crowd was loud, but the record is utterly devoid of any evidence that anyone had become violent, had seemed likely to become violent, or had in any remote way threatened violence. The Commonwealth also failed to establish that, whatever interest in public safety it undoubtedly has, it could not have fulfilled that interest by means that were less restrictive of petitioner's constitutional right to preach to this crowd.

The Appeals Court's affirmance therefore conflicts with *Yoder*, *Smith*, and *Hialeah* and should be reviewed by this Court, or, at the least, remanded for consideration by the Appeals Court.

D. The Appeals Court Also Failed to Address Petitioner's Argument that He was Denied Equal Protection of the Laws under the Fourteenth Amendment.

As with his free exercise argument, the Appeals Court ignored petitioner's argument that the confiscation of his megaphone and subsequent arrest violated his right to equal protection of the laws in Salem. Petitioner advanced this argument under both the 14th Amendment to the U.S. Constitution—that no state may "deny to any person within its jurisdiction the equal protection of the laws"—and the Massachusetts constitutional counterpart. Under Massachusetts law, the analysis is the same for both provisions of law. *See LaCava v. Lucander*, 791 N.E.2d 358 (Mass. 2003).

In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), this Court recognized that strict scrutiny is applied to legal classifications that "trammel[] fundamental personal rights or [are] drawn upon inherently suspect distinctions such as race, *religion*, or alienage." *Id.* at 303 (emphasis added).

The Salem Code, regardless of which day of the year, gives all persons engaged in noncommercial speech the equal right to use amplification devices until 10:00 p.m., a right that was denied to petitioner and his associates because of their expressed Christian beliefs. Salem Code Art. I, § 22-2(2)(a) (App. 32a-33a). Not only did the Salem police unilaterally ignore the 10:00 p.m. cutoff time in the code, it created its own 8:00 p.m. deadline *ultra vires* and then compounded the constitutional violation by unequally applying its 8:00 p.m. policy against street preachers like petitioner (Tr. p. 52-54, 69.), with only one exception for anti-abortion speakers (Tr. p. 45). (See Ex. 2-B at 8:00-8:04 p.m.; Ex. 2-C at 8:18-8:30 p.m.) It was this singling-out of Repent America speakers that prompted petitioner to ask the officers for an explanation for their confiscation of his megaphone while other amplification continued to fill the public square at the same time. (Ex. 2-C at 8:28-8:30 p.m.) Other "secular" but otherwise similarly-situated users of amplification devices were allowed to continue past the police officers' 8:00 p.m. deadline. (See Ex. 2-B at 8:05-8:12 p.m.)

The only distinction between petitioner's group of evangelists and other groups using amplification that night, was that petitioner and Repent America are evangelical Protestant Christians expressing evangelical Protestant Christian beliefs. (Tr. p. 191.)

Thus, not only was petitioner targeted as a member of a suspect class but he was stopped from enjoying fundamental rights of free speech and free exercise of religion. His arrest and prosecution, therefore, required strict scrutiny review.

The Commonwealth's actions here fail the strict scrutiny test. Public safety is a compelling interest, but the Commonwealth never proved that public safety was threatened by petitioner's preaching, and certainly not to the extent that the police needed to shut off his megaphone after 8:00 p.m. Even if the Commonwealth could prove that public safety was threatened, it failed to prove that the police could not have preserved public safety by a content-neutral and viewpoint-neutral policy of shutting down *all* amplification for *all* individuals, groups, and businesses—instead of discriminating against petitioner and Repent America. By singling out petitioner for discrimination and cutting off his amplification and few others', the Salem police applied an unequal enforcement of a law against a religious person's liberty and property in violation of the equal protection clause.

CONCLUSION

For the reasons stated, this Honorable Court should grant petitioner's writ of certiorari to review the decision of the Massachusetts Court of Appeals.

Respectfully submitted,

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July 1, 2010

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COMMONWEALTH

v.

Michael A. MARCAVAGE

456 Mass. 1104, 925 N.E.2d 547 (Table)

Supreme Judicial Court of Massachusetts.

March 31, 2010

Appeal From: 76 Mass.App.Ct. 34, 918 N.E.2d 855.

DENIED.

COMMONWEALTH
v.
Michael A. MARCAVAGE

Appeals Court of Massachusetts,
Essex.

No. 08-P-1294.

ORDER

The petition for rehearing filed by appellant, Michael A. Marcavage, having been considered, it is ordered that the said petition be, and the same hereby is, denied.

By the Court (Berry, Mills & Wolohojian, JJ.),

/s Lena M. Wong
Assistant Clerk

Entered: February 4, 2010.

COMMONWEALTH
v.
Michael A. MARCAVAGE

76 Mass.App.Ct. 34, 918 N.E.2d 855

Appeals Court of Massachusetts,
Essex.

No. 08-P-1294.
Argued May 8, 2009.
Decided Dec. 23, 2009.

Present: BERRY, MILLS, & WOLOHOJIAN, JJ.

MILLS, J.

The defendant, a street evangelist, was arrested on Halloween night, 2007, in the city of Salem and charged with disorderly conduct, G.L. c. 272, § 53. He was convicted following a bench trial in the District Court, and argues on appeal that (a) the evidence was insufficient; (b) he received inadequate notice of the Commonwealth's theory of the case; and (c) the confiscation of a megaphone by police violated various State and Federal constitutional protections. We affirm.

Background.[1] The defendant is the director of a proselytizing group that visits Salem each Halloween

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[1] We recite the evidence in the light most favorable to the Commonwealth, *Commonwealth v. Latimore*, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979), for purposes of evaluating the sufficiency of the evidence. To the extent that our recitation is inappropriate for evaluating other arguments, we so specify.

to preach to the crowds. Late in the afternoon, the defendant and his group stationed themselves in the Townhouse Square section of Salem.[2] The area was extremely congested (most people stood "elbow-to-elbow") and contained a dry fountain with an exterior wall comprised of three steps. Some group members took turns preaching with a megaphone from atop the fountain wall, while other members moved among the crowd gathered at its base. This was a visit that the defendant and his group made annually to Salem. They were well aware of the Halloween event and the crowd and conditions during the evening of Halloween.

The defendant's interactions with the crowd generated many complaints to police. He blocked the path of some people and encroached upon the personal space of others with his megaphone. Some people were frightened by him. The defendant waved a Bible "within inches" of people's faces. Some people became upset and backed away, while others walked around him. Other times, the defendant prompted complaints by using his megaphone within a foot of the faces of people passing by. His voice "tower[ed] over most," notwithstanding that it was an extremely loud night. On three or four occasions between 7:30 and 8:30 P.M., the defendant accosted people by approaching them and yelling, at times within inches of their faces, and he created more of a disturbance than any other

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[2] As many as 100,000 people were present in Salem on that Halloween night. Of those, as many as 20,000 were present in the immediate area surrounding Townhouse Square, which is the center of the Halloween activity and the principal pedestrian route for the crowds.

person in the area. A police officer relayed complaints he had received about the defendant to his supervisor, who also had received complaints regarding the defendant's behavior.

Meanwhile, as the night progressed, more people entered Salem and the earlier family atmosphere began to disappear. The crowd became more hostile with the addition of intoxicated individuals. It became a younger crowd with a "lot of college students." At around 8:00 P.M., the supervising police officer approached the defendant and one of his colleagues. The latter, standing atop the fountain wall, was preaching with a megaphone while the defendant stood nearby. The supervising officer ordered that the defendant's colleague cease use of the megaphone.[3] The colleague complied, and the officer left the area.

At approximately 8:20 P.M., the defendant resumed use of the megaphone, at which point the police officers promptly reiterated the order and warned that confiscation of the megaphone or arrest might result if the defendant refused to cooperate. The defendant temporarily complied with the order.

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[3] In the interests of public safety, police supervisors instructed officers that all megaphone use should be stopped at 8:00 P.M. on Halloween. The order was only a small measure the police undertook to ensure public safety during what is Salem's most notorious night. The parties have argued extensively in their briefs and at oral argument about the Salem sound ordinance, which prohibits the use of megaphones after 10:00 P.M. The ordinance is irrelevant here. The supervising police officers had made a decision, in the interests of public safety and order, to curtail behavior they reasonably believed to threaten the safety of the public.

Around 8:35 P.M., the defendant, contrary to the police orders, persisted in using the megaphone. The supervising police officer approached the defendant once more, reiterated the earlier orders, and after issuing another warning, attempted to confiscate the megaphone. The defendant held tightly to the megaphone and verbally protested the confiscation. Two officers assisted the supervisor, and pushing and shoving between the defendant and the officers resulted. Then, the defendant "went limp," which caused him to fall into the fountain, bringing the officers to the ground with him. Immediately thereafter, the officers stood up and arrested the defendant. The crowd was noisy and raucous, and the area was congested and became dangerous. The defendant, by refusing police orders and resisting the confiscation of the megaphone, drew a hostile crowd that was out of control. The police were concerned for their own safety as well as the safety of the crowd.[4]

Discussion. Ordinarily, in assessing whether the evidence adduced at trial is sufficient to meet the government's threshold burden of proof, all evidence presented to the fact-finder is considered. Moreover,

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[4] Approximately 200 police officers were on duty that night assigned to maintain order and assure public safety. In an earlier year, on Halloween evening in Salem, there were two shootings, several stabbings, and sixty arrests, with many more individuals taken into protective custody. Each year, intoxication among the crowd was a major issue, and increased as the evening progressed. In 2007, the Salem police force was augmented by police officers from surrounding communities as well as some members of the sheriff's department and mounted officers from the Boston police department. There were approximately six officers specifically assigned to monitor the Townhouse Square area.

the evidence is, according to the familiar formulation, "viewed in the light most favorable to the Commonwealth." See *Commonwealth v. Latimore,* 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979). Here, however, there are strong indications in the record that the fact finder-in this case the trial judge-expressly discredited at least some of the government's proof; viz., evidence that the defendant had engaged in violent or tumultuous conduct *apart* from his refusal to obey a police order to stop using the megaphone. Consistent with these findings, the judge apparently premised the defendant's conviction solely on his defiance of the order to stop using the megaphone and the direct consequences of his refusal to do so.[5] In these circumstances, our inquiry is limited to the question of whether those actions, in context, amounted to disorderly conduct as contemplated by G.L. c. 272, § 53.[6]

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[5] The judge's findings may well have reflected his legitimate concern that, to the extent that the record left open the possibility that the defendant's conviction was premised, even in part, on conduct shielded by the First Amendment (e.g., the defendant's missionary appeals and preaching), it might have been susceptible to reversal on appeal. See *Commonwealth v. Richards,* 369 Mass. 443, 446-448, 340 N.E.2d 892 (1976). The judge indicated that the defendant's conviction rested solely on the evidence of his refusal to obey the police command to stop using the megaphone, and the consequences therefrom, and that the defendant had not been convicted on the basis of any protected conduct.

[6] The defendant alleges that this conduct-continuing to use the megaphone after being requested to stop by police-is not encompassed by the bill of particulars. However, the bill of particulars put the defendant on notice that it was the loud disturbance created by his "yelling [and] screaming," together with the resulting "public ... alarm" that was the basis of the

General Laws c. 272, § 53, proscribes, inter alia, engaging in "tumultuous behavior." *Commonwealth v. Feigenbaum*, 404 Mass. 471, 474, 536 N.E.2d 325 (1989). While susceptible to multiple meanings, see *Commonwealth v. Sholley*, 432 Mass. 721, 727-728, 739 N.E.2d 236 (2000), "tumultuous behavior," for the purposes of § 53, includes the refusal to obey a police order. See *Commonwealth v. Sinai*, 47 Mass.App.Ct. 544, 548-549, 714 N.E.2d 830 (1999). There, the defendant, angry at being forced to pay a parking fee, refused a police order to leave the area; pounded the steering wheel of his car and shouted obscenities; attracted a large crowd of onlookers; forced traffic to be rerouted; and resisted attempts by police to take him into custody. This behavior, the court concluded, amounted to "tumultuous conduct." *Id.* at 549, 714 N.E.2d 830.

The facts of the present case require a consistent result. The evidence supports the inference that the defendant, by refusing the police order to stop using the megaphone, created the same sort of threat to public safety occasioned by the defendant's conduct in *Commonwealth v. Sinai, supra.* Indeed, if anything, the danger was far greater here in view of the very large crowds involved, the likely widespread public intoxication, the history of criminal conduct on

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disorderly conduct charge. While the megaphone is not mentioned specifically, the focus in the bill of particulars nonetheless was on the high noise level associated with the defendant's activities and the effects of same. The bill of particulars also incorporated by reference documents that the Commonwealth had previously provided to defense counsel, including a police report that contained a description of the defendant's megaphone use.

Halloween in Salem, and the intensity of the physical altercation between the defendant and police.

Bolstering our conclusion that the defendant's conduct amounted to tumultuous behavior is the fact that there was evidence that the defendant, by disobeying the order to stop using the megaphone, had engendered hostility toward police and disrespect for their authority among the crowd. Precisely the same factors were cited in *Commonwealth v. Richards,* 369 Mass. 443, 446-448, 340 N.E.2d 892 (1976), in concluding that the defendant had engaged in tumultuous behavior. Likewise, in *Commonwealth v. Carson,* 10 Mass.App.Ct. 920, 921, 411 N.E.2d 1337 (1980), we relied upon the fact that the defendant's conduct "attracted approximately 50 people, some of them laughing or yelling abuse at the police," in concluding that the defendant properly had been convicted of being a disorderly person under § 53. The defendant's actions here, like those of the defendants in *Richards* and *Carson,* exposed both the police and the public to danger by reducing the ability of police to maintain order. See *Commonwealth v. Mulero,* 38 Mass.App.Ct. 963, 965, 650 N.E.2d 360 (1995) (defendant engaged in tumultuous behavior when he flailed his hands "in an agitated and belligerent manner while berating [the officer] with loud profanities").

Finally, while the defendant argues otherwise, we conclude that the police had ample authority to order the defendant to stop using the megaphone once they determined that such conduct posed a public safety risk. Within the scope of their community caretaker function, and under the general power of arrest

conferred on police by G.L. c. 41, § 98,[7] police have authority to take reasonable protective measures whenever public safety is threatened by acts that are dangerous, even if not expressly unlawful. See, e.g., *Commonwealth v. Bates,* 28 Mass.App.Ct. 217, 219 & n. 2, 548 N.E.2d 889 (1990) (emergency or "community caretaker" exception authorizes police to make otherwise unlawful entries or searches in certain emergencies "to protect or preserve life or avoid serious injury"). As the judge specifically found, the police exercised that power with admirable restraint on the night of the defendant's arrest. Several government witnesses testified that the defendant's use of the megaphone cultivated both fear and anger

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[7] General Laws c. 41, § 98, as amended by St.1967, 368, §§ 1, 2, provides, in relevant part:

> "The chief and other police officers of all cities and towns ... may disperse any assembly of three or more persons, and may enter any building to suppress a riot or breach of peace therein. Persons so suspected who do not give a satisfactory account of themselves, persons so assembled and who do not disperse when ordered, and persons making, aiding and abetting in a riot or disturbance may be arrested by the police, and may thereafter be safely kept by imprisonment or otherwise unless released in the manner provided by law, and taken before a district court to be examined and prosecuted.
>
> "...
>
> "If a police officer stops a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If he finds such weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall return it, if lawfully possessed, or he shall arrest such person."

in the very large crowd, which implicated legitimate safety concerns.

Contrary to the defendant's claims, we find nothing in the record to support the inference that the decision to curtail the defendant's use of the megaphone was in any way connected with the content of his speech. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Indeed, as the defendant concedes, similar limits were imposed on at least one other nearby group. It is also significant to note that the police order by no means prevented the defendant from disseminating his message; rather, it was directed only at the manner of the defendant's delivery. See *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (manner restrictions in public spaces permissible provided they are content neutral, serve a significant government interest, and leave open alternative channels of communication). Moreover, the restriction was imposed in direct response to the changing conditions during the evening. See *Freedman v. Maryland,* 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (describing procedural safeguards required to justify any prior restraint on potentially protected speech). Both of these factors militate in favor of finding the police action lawful as a measured and appropriate response to a bona fide public safety threat.

In view of the foregoing, we conclude that the defendant's failure to obey the police command to stop using the megaphone, in the particular context of Halloween night in Salem, ultimately created the kind of "hazardous or physically offensive condition affecting the public," *Commonwealth v. Molligi,* 70

Mass.App.Ct. 108, 111, 872 N.E.2d 1166 (2007), cognizable by § 53. While his underlying conduct, particularly dissemination of his religious message, may have enjoyed First Amendment protection, that protection did not entitle him to disregard police commands reasonably calculated at ensuring public safety amid potentially dangerous circumstances. Moreover, the police-imposed limits were content neutral, and no more restrictive than necessary to protect the public. The defendant's conviction, therefore, transgressed no constitutional limits, and was otherwise proper in all respects. The defendant's motion for a required finding of not guilty was properly denied.

Judgment affirmed.

COMMONWEALTH

v.

Michael A. MARCAVAGE

Salem District Court

No. 0736CR003506

Bench Trial, Hon. Michael A. Uhlarik

March 10, 2008

TRANSCRIPT OF PROCEEDINGS

[Motion for a Directed Verdict]

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MS. PRINCE: Your Honor, the Commonwealth rests.

THE COURT: All right. Commonwealth rests.

MR. DuPRE: Your Honor, at this point, I would kind of would like to make a motion for a directed verdict.

THE COURT: You may be heard.

MR. DuPRE: Thank you.

THE COURT: Okay.

MR. DuPRE: Your Honor, the Commonwealth simply has not proven their case. They have proven that he was using the megaphone at 8:00. They have already dismissed that charge. And all the evidence we have heard here today is regarding his use of the megaphone. You know, even despite—even the officers'

testimony did not rise to the

level of disorderly conduct. It rose to the level of part of the hubbub of a Halloween night in Salem.

But Mr. Marcavage's preaching, which is protected by the Massachusetts and the United States Constitution, it's protected expression of religious speech. And the officers have testified that the only reason they approached him and arrested him was because of their 8:00 deadline in spite of the Salem Code that says it's a 10:00 deadline.

So, at this point, for these and other reasons, the Defendant moves for a directed verdit in this case.

MS. PRINCE: Your Honor, the Commonwealth takes a different view of the situation. Obviously, the use of the bullhorn is central to what is happening. But we have

a situation that's Halloween night. As the officers have described, it can be a volatile night. There's a lot of people

there. As the day goes on, it escalates.

Mr. Marcavage – they said that they gave him a great deal of latitude due to the nature of his speech. But, Your Honor, it's not that he just used the bullhorn. He used the bullhorn to get in people's faces. He caused people to stay away from particular areas. This was at 8:00 at night. And one very relevant point that the officer testified, the use— or the situation is much different at 8:00 than it is at 3:00 because of the circumstances of the crowd. This is a crowd of somewhere between 60,000 and 80,000 people. And, Your Honor, Mr. Marcavage, although the Commonwealth takes no issue with what he was saying all

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by itself, but when you are threatening that people are going to Hell, that they have to repent, and they are going up into their face to do it when there is thousands of people around, the Commonwealth contends that this is tumultuous behavior and not permissible according to the disorderly statute. It's true, Your Honor, they did speak to him

earlier. But my sense of it is, if they stop using the bullhorn, they wouldn't need to arrest him.

* * *

MS. PRINCE: In any event, Your Honor, the situation is much different at 8:00. I don't think that the police were terribly interested.

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Even if the Commonwealth maintains that the disorderly conduct is happening all day, but it was okay because they allowed it to happen in the sense of, all right, we can manage this. There's a line here about freedom of speech that they didn't want to cross. But at 8:00, the situation is different. The town is full of people. They don't have as much control as they would have at 3:00. And they asked him to stop using the bullhorn. The reason they asked him to stop, Your Honor, is because, at 8:00, it's harder to control the situation. It's different. It's much different.

There is a statute, Your Honor, which I would say is relevant to the extent that the statute says that non-commercial has to—commercial has to stop

at 8:00, non-commercial has to stop at 10:00. I suggest to you,

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Your Honor, that the statute is relevant to the extent that the later you get, the more volatile a situation is. And here you have a situation where he is using a bullhorn where there were numerous complaints from people around. Officer Davis testified if people wanted to get out of the way, they had to walk around him due to the bullhorn being in their face. And not only that, Your Honor, he was waving the Bible in their face. I would suggest, Your Honor, that at this point, the Commonwealth has met its burden and in fairness to the Commonwealth, it has to be denied.

THE COURT: Counsel, let me ask you: Putting aside for a moment the issue of the ordinance, the 8:00 versus the 10:00, I've heard evidence in which law enforcement officers went up to your client. At least one or two separate

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officers went up and apparently in a very orderly fashion had requested that he stop using the

megaphone at 8:00. Actually, your client apparently followed that request for at least 35 minutes and wasn't using the megaphone and then—

MR. DuPRE: Just to correct, Your Honor, that it wasn't him that was using the megaphone at 8:00. He was using it thereafter.

THE COURT: His group.

MR. DuPRE: His group.

THE COURT: All right. And then at 8:35 or so, I heard testimony the officers heard your client use the megaphone. They went up to him, again, asking to cease from using it. And at that time, your client refused to the point of resisting the officer from confiscating the megaphone to the point that there was a physical struggle. I heard testimony of pushing and shoving

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to the point that two officers apparently went down with your client.

What do you say as to your client—even if the Court were to find that technically the megaphone ordinance, noise ordinance, was not until 10:00, the fact that law enforcement officers in a—I think it's fair

to say—a unique situation of thousands of people, and I heard testimony from these officers as to the mood of this crowd. Based upon prior experiences, every Halloween in Salem there is increased drinking. There is rowdiness. There is throngs of people. The officers use their discretion not to silence or totally mute your client, but merely asked him to change the means of amplification; that being, don't use the megaphone. Because in their judgment, it

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could potentially cause a serious problem, crowd control, fights breaking out, things like that. He resisted. What do you say to that?

MR. DuPRE: Well, Your Honor, he didn't resist, and we haven't seen the video yet. Officers also testified kind of contradictory, that I might add, that he was— He was holding onto it while he was trying to get an explanation for Officer Lemelin. Others have said pushing and shoving, yes. But they all said he didn't fight. He didn't struggle. They said his body went limp, and then they all

fell in the fountain.

So, Mr. Marcavage was holding onto the megaphone because he has had equipment snatched from the police officers before. So, he has a history of run-ins with the police trying to shut him down.

The reason, Your Honor, that

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he held on to it was because, within his view, he saw businesses blaring music out into the street with amplification. He saw a circus group not 100 feet away using amplification.

THE COURT: So, what you are putting forward, Counsel, is the fact that an individual has the right to defy law enforcement request to cease from doing something?

MR. DuPRE: Unlawful law enforcement requests, not to struggle, Your Honor. But he was looking for an explanation as to why he was being singled out, or—I can't even say enforcement of the noise ordinance or enforcement of this 8:00 arbitrary — (inaudible) —

THE COURT: Okay. Motion denied. Defense, do you have any witnesses?

COMMONWEALTH

v.

Michael A. MARCAVAGE

Salem District Court

No. 0736CR003506

Bench Trial, Hon. Michael A. Uhlarik

March 10, 2008

TRANSCRIPT OF PROCEEDINGS

[Trial Court's Ruling]

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8 THE COURT: All right. Let me just—
9 Before I impose a sentence, let me
10 just say a few things here based
11 on what I heard today from a
12 number of witnesses and also
13 watching the video tape. To me,
14 it was—from what I could see on
15 the videotape and from listening
16 to all the witnesses, it appeared
17 to me that the Salem Police
18 Department exercised a good amount
19 of fear discretion, respecting the
20 rights of your client, went out of
21 their way, from what I could see
22 on the videotape of trying to
23 handle a situation in a very
24 professional manner.
25 Nonetheless, despite these

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1 efforts by the police department,

I heard testimony and I also saw on videotape your client's defiance, clear cut defiance of the request of the police department to refrain from using the bullhorn. There was never a request by the police department for your client to leave the area, to not say anything. Your client was still free to exercise his right to speech. The issue at hand, though, is the fact that from everything I have heard and also seen on videotape is that Halloween in Salem is a unique day of the year. It's a very small community, but on this particular day, I've heard testimony of anywhere from 60,000 to 80,000 people cram into a very tight space. In this day and age, we have to be very concerned about controlling crowds.

And I heard testimony that

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this crowd is sometimes characterized by public drunkenness, violence. And the police have to try and contain—and imagine if you will, 60,000 to 80,000 people with 200 police officers. Quite an immense task for a police department to manage.

The police department approach your client on two occasions—I saw it on the videotape—in which they had made observations throughout the day. They testified that they saw your client and other members of the group be somewhat aggressive in going out to the public, causing the public to react by backing away from your client and other members of the group. Also having to field many inquiries from members of the community concerned about the conduct of your client.

Despite these comments at the

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time, before 8:00 the police, again using their discretion, opted to let your client continue using the bullhorn and exercising his right to speech. But at 8:00, when I heard testimony that the content of the crowd begins to change from a family atmosphere to one of, again, a concern for a drunkenness, violent behavior and so forth, the police were concerned that if your client continued using the bullhorn and the tactics that they described, it could create a very tumultuous

situation. And it was decided at that time that your client should not stop talking but merely stop using the bullhorn, which I think a reasonable person would be able to say could exacerbate a situation. He refused. I agree. I did not see any violent behavior on the part of your client at 8:35 on the videotape, but what I did

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see was defiance and basically passive aggressiveness in which he refused the police officer's request to surrender the bullhorn causing the police officers to have to physically take the bullhorn from him causing, not only your client, but also two uniformed police officers with the police department to fall. Not a good decision on the part of your client, especially when there is a crowd. And I heard the crowd on that videotape reacting perhaps favorably to the police doing what they did to your client, but also others not in support of the police.

And, Counsel, when you've got 60,000 to 80,000 people in a small area, I would suggest that's a very frightening situation for

anyone, especially police officers who are trying to control conduct. This is not an issue of depriving

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anyone of freedom of speech. It's a question of public safety. And I would advise your client that he used some poor judgment that day and caused some unnecessary developments to occur.

So, with that in mind, what I am going to do is—he shall be found guilty. I am going to impose a $200 fine, and I am not going to put him on probation. I think the Commonwealth is justified in asking that he be placed on probation and stay away from Salem, but I am going to hope that your client has learned and there will not be any future problems like this is the future. He is more than welcome to come back to Salem, but not behaving in this sort of manner. All right?

So, that's the Court's finding. It's a guilty finding, $200 fine. How much time does he need to pay the fine?

COMMONWEALTH OF MASSACHUSETTS

Essex, ss

DISTRICT COURT DEPT.
SALEM DISTRICT COURT
DOCKET NO. 0736CR3506

COMMONWEALTH

V.

MICHAEL MARCAVAGE

BILL OF PARTICULARS

The Commonwealth alleges:

1) The defendant is a disorderly person due to his conduct on October 31, 2007, between 4:00 PM and 8:35 PM.

2) The Commonwealth alleges that the defendant involved himself in tumultuous behavior by forcing literature in the faces of attendees, yelling, screaming, taunting, and recklessly waving a crucifix in and about the faces of attendees as they past [sic] by the public pulpit set up by the group Repent America.

3) The Commonwealth alleges that this activity affected the public, those attending the Halloween Happenings.

4) The Commonwealth alleges that this behavior caused public inconvenience, annoyance and alarm.

In responding to a Defendant's Motion for a Bill of Particulars, the Commonwealth is not required to provide a resume of its case. Commonwealth v. Amirault, 404 Mass. 221 (1989). The Commonwealth further responds that information pertaining to the information sought by the Defendant can be found in the documents and reports provided to defense counsel. The Commonwealth also reserves the right to amend this Bill of Particulars up to and during the trial.

Respectfully submitted
For the Commonwealth
Jonathan W. Blodgett
District Attorney

/s Jane D. Prince
Jane Dever Prince
Assistant District Attorney
Salem District Court
65 Washington Street
Salem, MA 01970
978-744-5681

DATED: March 4, 2008

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws Annotated Ch. 272

§ 53. Penalty for certain offenses

(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.

(b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.

Massachusetts General Laws Annotated 277

§ 35. Variance; prejudice

A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defence. He shall not be acquitted by reason of an immaterial misnomer of a third party, an immaterial mistake in the description of property or the ownership thereof, failure to prove unnecessary allegations in the description of the crime or any other immaterial mistake in the indictment.

Salem, Massachusetts Code of Ordinances

ARTICLE I. IN GENERAL

Sec. 22-1. Certain noises prohibited generally.

(a) It shall be unlawful for any person to make, continue, or cause to be made or continued any loud, unnecessary or unusual noise or any noise which:

(1) Endangers or injures the safety or health of humans or animals;

(2) Annoys or disturbs a reasonable person of normal sensitivities; or

(3) Endangers or injures personal or real property, which noise shall be termed a "noise disturbance" for the purposes of this chapter.

(b) Noncommercial public speaking and public assembly activities conducted on any public space or public right-of-way shall be exempt from the operation of this section.

(Code 1973, § 16 1/2-1)

Sec. 22-2. Noises enumerated.

The following acts, among others, and the causing thereof are declared to be loud, disturbing and unnecessary noises and to be in violation of this chapter, but such enumeration shall not be deemed to be exclusive:

* * *

(2) Loudspeakers/public address systems.

a. Using or operating for any noncommercial purposes any loudspeaker, public address system, or similar device between the hours of 10:00 p.m. and

8:00 a.m. the following day, such that the sound therefrom creates a noise disturbance across a residential real property boundary or within a noise sensitive zone.

b. Using or operating for any commercial purpose any loudspeaker, public address system or similar device such that the sound therefrom creates a noise disturbance across a real property boundary between the hours of 6:00 p.m. and 10:00 a.m. the following day on a public right-of-way or public space.